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In the Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL POWER COMMISSION, PETITIONER

v.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,

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THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) [1] is reported at 520 F. 2d 432. The initial

[1] "Pet. App." references are to the appendices to the petition in No. 74-1619.

opinion and order (No. 623) of the Federal Power Commission (Pet. App. 42a–74a) and the opinion (No. 623–A) denying rehearing (Pet. App. 75a–76a) are reported at 48 FPC 40 and 48 FPC 371, respectively.

JURISDICTION

The judgment of the court of appeals (Pet. App. 41a) was entered on February 5, 1975. On May 2, 1975, the Chief Justice extended the Commission's time for filing a petition for a writ of certiorari to and including June 20, 1975.

The petition for a writ of certiorari was filed in No. 74–1619 on June 20, 1975. A cross-petition for a writ of certiorari was filed on June 20, 1975, by the National Association for the Advancement of Colored People, *et al.* in No. 74–1608. On October 14, 1975, the Court granted both petitions and consolidated the cases. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1), Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

QUESTIONS PRESENTED BY THE FEDERAL POWER COMMISSION

1. Whether the Federal Power Commission correctly determined it has no authority to consider coincidentally to the performance of its regulatory functions under the Federal Power Act, 16 U.S.C. 791a, *et seq.* and the Natural Gas Act, 15 U.S.C. 717, *et seq.* evidence that a regulatee is a demonstrated discriminator in its employment relations.

BY THE NAACP

1. Whether the Federal Power Commission, pursuant to its mandate to regulate in the "public interest," has both statutory authority and responsibility broadly to proscribe employment discrimination in the industries it regulates.

2. Whether, having found that the Federal Power Commission had jurisdiction over employment discrimination for the limited purpose of protecting consumers from illegitimate costs, the court below erred in refusing to require the agency to adopt rules to effectuate its jurisdiction.

3. Whether the Federal Power Commission, by reason of its extensive involvement in the regulation of the gas and electric utility industries, has a Constitutional duty to proscribe employment discrimination by the companies it regulates.

STATEMENT

1. On June 22, 1972, The National Association for the Advancement of Colored People *et al.* (NAACP) petitioned the Federal Power Commission (Commission) to issue a rule which would regulate the employment practices of its regulatees. Attached to the petition was a proposed rule dealing with equal employment opportunity in the electric and gas utility industries (Pet. App. 34a–40a). NAACP claimed that the Commission had authority to regulate these matters under various sections of the Federal Power Act and the Natural Gas Act, the two Acts which the Commission primarily administers. It was further

contended that since there was a national policy against employment discrimination, the "public interest" standard, as used in various sections of these Acts, necessarily includes that national policy. Finally, NAACP urged that the Constitution required the Commission to regulate the employment practices of the regulatees.

On July 11, 1972, the Commission issued Opinion No. 623 which dismissed the petition for lack of jurisdiction (Pet. App. 42a–74a). The Commission stated that it lacked the requisite Congressional authority to promulgate equal employment practices of those companies which it regulates. The Commission pointed out that there was nothing in the legislative history or the specific sections of either of these acts which would extend its regulatory authority into the internal labor-management problems of its regulatees. To the suggestion that the "public interest" standard expanded its jurisdiction into this area, the Commission responded that Congress did not charge it with regulating all matters affecting the public welfare. Rather, "[a]pplication of public interest concept in the context of any given regulatory statute presupposes inquiry into and observance of, the legislative purposes of the Act" (*id.* at 47a). The Commission added that "the Purposes of the Natural Gas and Federal Power Acts are economic regulation of entrepreneurs engaged in resource development" (*ibid.*). Finally, with regard to the constitutional arguments, the Commission found that regulation under these two Acts did not significantly involve the fed-

eral government with any alleged discriminatory employment practices of its regulatees in a way which served to deny any person equal protection of the laws.

2. A petition for review was filed by NAACP. Upon review, the court of appeals disagreed with the Commission's assessment of its jurisdiction and vacated and remanded the orders. The court distinguished between "two kinds of jurisdiction" in evaluating the limitation of Commission authority. The first type of jurisdiction would be over employment discrimination *per se*—a power to, "prescribe personnel practices in detail and to receive complaints, adjudicate them and punish directly infractions of those practices" (Pet. App. at 7a). The second would be a, "power to take into account, in the performance of its regulatory functions, including licensing and rate review, evidence that the regulatee is a demonstrated discriminator in its employment relations" (*id.* at 8a). The Court concluded that the Commission lacks the former type of authority but possesses the latter.

The Court ruled that the Commission's power to regulate employment discrimination *per se,* if it existed at all, could only exist if it were found, "among the Commission's statutorily defined objectives" (*id.* at 16a). The objective of the statutes administered by the Commission was, according to the court, "to insure the efficient performance of an industry in which the normal forces of competition are * * * not equal to the task" (*id.* at 16a–17a).

With respect to NAACP's argument that the "public interest" standard would embrace prevention of employment discrimination, the court concluded, "that Congress has not charged the Commission with advancing *all* public interests, but only the public's interest * * * in the conservation of natural resources and the enjoyment of cheap and plentiful electricity and natural gas" (*id.* at 19a).

The court, however, did find authority for "FPC Regulation of Employment Discrimination Coincidentally to Proper Commission Concerns" (*id.* at 24a). The court reasoned that the Commission's primary responsibility of "protecting the consumer against exploitation" could "be alternatively described as the task of seeing that no unnecessary or illegitimate costs are passed along to that consumer" (*id.* at 25a). And the court found, "[c]osts incurred by reason of a regulatee's choosing to practice racial discrimination are within the reach of that responsibility" (*ibid.*). The court identified costs "arguably within the Commission's range of concern" as follows (*id.* at 25a–26a):

> (1) duplicative labor costs incurred in the form of back pay recoveries by employees who have proven that they were discriminatorily denied employment or advancement, (2) the costs of losing valuable government contracts terminated because of employment discrimination, (3) the costs of legal proceedings in either of these two categories, (4) the costs of strikes, demonstrations, and boycotts aimed against regulatees because of discrimination, (5) exces-

> sive labor costs incurred because of the elimination from the prospective labor force of those who are discriminated against, and (6) the costs of inefficiency among minority employees demoralized by discriminatory barriers to their fair treatment and promotion [footnote omitted].

The court did not limit the Commission's responsibility to disallowing quantifiable costs, but suggested further that, "a regulatee with a very poor equal employment opportunity record might be presumed to have incurred excess labor costs * * *, and that these costs, being difficult to quantify and prove, will be rebuttably presumed to equal a certain percentage of actual labor costs" (*id.* at 27a).

With respect to licensing, the court viewed the Commission's authority as extending beyond consideration of identifiable costs: "[i]t is conceivable that an applicant's record could be so riddled with discrimination-related legal difficulties * * * that the Commission could validly conclude that for this reason it should not be permitted to be the recipient of franchise grants" (*id.* at 26a).

The court also held, with respect to the Commission's rulemaking powers, that the Commission should consider the promulgation of rules requiring filing with it of forms now required by the Equal Employment Opportunity Commission (EEOC) and rules permitting intervention by any person believing himself aggrieved by an employment practice (*id.* at 31a, 39a–40a).

Finally, passing beyond the question of whether the Commission's regulation of its regulatees was "state action" involving the agency in the companies' discrimination, the court concluded that, even if such a relationship existed, "the Constitution [does not] * * * compel * * * the legislature affirmatively to legislate in a certain way" (*id.* at 30a). The court concluded that the Constitution does not require the Commission affirmatively to regulate employment discrimination.

SUMMARY OF ARGUMENT

A. While accepting that the Commission has no power to regulate employment discrimination *per se,* the court found, in the Commission's unquestioned jurisdictional authority to disallow illegal costs, an ancillary power to " 'regulate' employment discrimination" coincidentally to that regulatory concern. While we do not question the premise that the Commission has jurisdiction to disallow unjust and unreasonable costs, we submit that the powers to regulate employment discrimination which the court of appeals found, cannot reasonably be derived from that premise. Thus, in addition to disallowing quantifiable costs such as back pay awards, the court found authority to "rebuttably presume" illegal costs from a history of discrimination, or to refuse a license altogether because of such history. The court also found authority in the Commission to issue rules requiring the filing with it of forms required by the Equal Employment Opportunity Commission and to require intervention by

individuals believing themselves to be victims of discrimination.

These powers—if the Commission possessed them—would for practical purposes require the Commission to regulate employment practices. There is no practical difference between prescribing employment practices and disallowing a portion of a rate increase or denying a license on the grounds of discriminatory employment practices. Similarly, there is little difference between adjudicating individual complaints and permitting intervention by, and the receipt of evidence from, individuals believing themselves aggrieved by an employment practice.

The effect of the court's decision below is contrary to the legislative history of the relevant statutes as determined by that court; nor can support for its decision be found in the Constitution.

The Commission readily adheres to its limited affirmative civil rights responsibilities as required by law: as an employer and agency of the federal government it meets statutory requirements concerning employment; as the agency designated to assure nondiscriminatory use of multipurpose hydro-electric facilities by all persons, regulations and other orders have been issued by the Commission. The Commission's efforts in responding to those mandates have not been contested. In *Pacific Gas and Electric Co.* 44 FPC 1365, 1367–8 (1970), *appeal dropped,* the Commission indicated it does not countenance discriminatory treatment in respect to the rendition of utility services which it regulates.

The Commission is of course cognizant and also fully supportive of the national policies of this Nation directed at eliminating all types of discriminatory treatment of persons based upon race, creed, color, religion, sex or national origin (Pet. App. 44a). The Commission stated in its Opinion below that "should the Congress assign to this agency responsibility of the type proposed by petitioners, we would undertake the enforcement thereof as a matter of highest priority." (Pet. App. 62a). Nevertheless, the Commission may not undertake that for which it has no authority mandated by Congress nor otherwise required by the Constitution.

The decision also imposes an impractical burden on the Commission and severely impairs the ability of the Commission to discharge its statutory responsibilities because of the Commission's lack of staff and technical expertise in that broad field. The Commission's statutory mandate was not intended, and therefore lacks the necessary flexibility, to provide adequate sanctions for violations of employment discrimination laws. The economic consequences of withholding license authorization or denying a rate adjustment would be far-reaching and offer overly narrow sanctions inconsistent with the remedial sanctions otherwise provided by Congress for such violations.

Employment discrimination is an area over which, as found by the court of appeals, the Congress spe-

cifically desired not to diffuse authority and accordingly centralized responsibility in the Equal Employment Opportunity Commission (Pet. App. 21a). Congress did not intend for the Commission to enter other areas of jurisdiction such as employment practices, child labor, minimum wage violations, or strikes and lockouts. If the Commisison is to become a forum for the airing of employment discrimination disputes, legislation, not adjudication, is first required.

The Fifth Amendment to the Constitution does not dictate administrative agency rules, regulations, and consideration of known or alleged discriminatory employment practices by companies they regulate. The far-reaching implications of this proposition sought by NAACP in No. 74-1608 were recognized and rejected by the court below.

No governmental action which the Commission takes denies any person of equal protection of the laws. The Commission's regulatory activities neither originate, enforce, nor foster private employment discrimination. The acts of the Commission's regulatees are not "state action" subject to the Constitution, *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345. The Constitution does not otherwise dictate governmental control of private actions.

B. Alternatively, if limited jurisdiction over employment is held to exist, the court below correctly recognized the Commission's authority to act affirmatively does not compel the issuance of rules.

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ARGUMENT

I

THE FEDERAL POWER COMMISSION HAS NO AUTHORITY TO CONSIDER COINCIDENTALLY TO THE PERFORMANCE OF ITS REGULATORY FUNCTIONS UNDER THE FEDERAL POWER ACT AND THE NATURAL GAS ACT, EVIDENCE THAT A REGLATEE IS A DEMONSTRATED DISCRIMINATOR IN ITS EMPLOYMENT RELATIONS

A. THE DECISION OF THE COURT OF APPEALS ERRONEOUSLY HELD THAT LIMITED JURISDICTION TO CONSIDER EMPLOYMENT DISCRIMINATION EXISTS IN THE FEDERAL POWER COMMISSION

1. The Commission agrees with the statement of the court of appeals that the Commission lacks power, "to regulate employment discrimination *per se*, a power, in other words, to act to curtail employment discrimination merely for the sake of seeing that practice curtailed" (Pet. App. 15a, and see also 24a–25a). The Commission submits, however, that the court erred in finding that the Commission does have power to "'regulate' employment discrimination" coincidentally to other proper regulatory concerns (*id.* at 26a).

The court premised its finding of the latter kind of power upon the Commission's undoubted responsibility of "protecting the consumer against exploitation," including the payment of "unnecessary or illegitimate costs" (*id.* at 25a). Our difference with the court of appeals is not over this premise, but the improper and illogical inferences which the court drew from the premise. The court hypothesized a

series of possible costs ranging from back pay awards to the cost of inefficiency stemming from demoralization (see *supra,* at pp. 6–7). While admitting that some of its suggested costs were "virtually unquantifiable" (Pet. App. 26a), the court implied that the Commission must attempt such quantification. Where exact quantification was impossible, but employment discrimination shown, the court suggested that some unspecified percentage of labor costs be "rebuttably presumed" to be illegal (*id.* at 27a, see *supra,* at 7).

With respect to licensing, the court abandoned the quest for quantification altogether and suggested that an otherwise qualified applicant with a poor record in racial matters could be denied a license (Pet. App. at 26a, see *supra,* at 7). The court also suggested that regulatees might appropriately be required to file Form EEO–1 with the Commission, and that alleged victims of discrimination should be allowed to intervene in any Commission proceeding (Pet. App. at 31a, see, *supra,* at 7).

With this conjury of powers, the court, through the medium of disallowing illegal costs, has for practical purposes required the Commission to regulate the employment practices of its regulatees. The court of appeals' reasoning thus conflicts with its initial holding that there is no jurisdiction to prescribe in detail personnel practices, and to receive and to adjudicate complaints, and to impose sanctions for infractions unrelated to its central regulatory purpose (Pet. App. 24a-25a). There is no practical distinc-

tion between prescribing personel practices and disallowing portions of rate filings or denying license applications on the grounds personnel practices are not in compliance with either the Commission's determination of proper employment practices or a minimum allowable level of employment complaints. Nor is there any effective distinction between receiving and adjudicating discrimination complaints and, as the court of appeals would have the Commission do, permitting intervention by a person who believes he or she has been subjected to discrimination and hearing evidence upon that grievance in order to sanction the regulatee via rate or certificate action.

The court of appeals recognized the power to regulate employment discrimination *per se* is a power to prevent it merely for the sake of seeing that practice curtailed. The court nevertheless suggests the Commission has the power to disallow portions of rate filings or deny license applications solely because employment discrimination exists. Such action would serve no fundamental purpose other than regulating employment discrimination. The styling of the proceeding may vary but the effective agency action does not. In either event the agency sanction would be grounded upon evidence of discriminatory activity.

Moreover, the remedy is harsher in the latter case. The impact of a corrective Commission order upon an individual complaint, which the court of appeals held would be outside Commission jurisdiction, would be far less draconian than the Commission's denial of

a primary application of a regulatee: a harsh and inflexible all-or-nothing sanction inconsistent with the remedies granted explicity by Congress to other agencies mandated to enforce the laws against employment discrimination. Commission consideration of a regulatee's personnel practices and consideration of evidence by an intervenor who believes himself subject to employment discrimination, and action upon a rate filing or license application based in whole or part upon those personnel practices and infractions, would in effect result in potential Commission enforcement of compliance by its regulatees with employment discrimination laws. Commission approval or denial of requests before it are of vital significance to applicants and directly affect their ability to continue proper service to the public. Jurisdiction indirectly to regulate employment practices through the denial or limitation of requests on the basis of personnel practices would therefore be tantamount to the direct regulation determined initially by the court of appeals to be proscribed.

There is no statutory support to justify the Commission's regulation of employment practices of its regulatees. The court of appeals affirmance of the Commission on this ground discussed in detail the pertinent legislation and its history. The Federal Water Power Act,[2] the Federal Power Act,[3] and the

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[2] 41 Stat. 1063 (June 10, 1920), *as amended* 16 U.S.C. §§ 791–823 (1970).

[3] 49 Stat. 803, 838 (Aug. 26, 1935), *as codified* 16 U.S.C. §§ 824–5 (1970).

Natural Gas Act,[4] each refer broadly to the "public interest". Nevertheless, as the court of appeals found, (*supra*, at 6) those references do not refer to all public interests, but to the public interest with respect to the interests the respective statutes were enacted to protect. As the Commission stated, "[a]pplication of public interest concept in the context of any given regulatory statute presupposes inquiry into, and observance of, the legislative purposes of the Act" (Pet. App. at 47a).[5]

The Federal Water Power Act concerns "the public's interest in the optimal use of waterways" with the objectives of exploiting the nation's hydro-electric resources through comprehensive planning to accomplish among other things, the conservation of resources (*id.* at 11a). The Federal Power Act is directed "to guard the [electric] consumer from the exploitation by non-competitive electric power companies" and, "assuring an abundant supply of electric energy throughout the United States with the greatest possible economy" (*id.* at 12a–13a). The Natural Gas Act was also enacted to prevent "the exploitation of the gas consumer" (*id.* at 14a).

The prevention of employment discrimination is not one of the Commission's statutorily defined objectives. The Congress did not entrust the Commission with any responsibility to prevent employment dis-

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[4] 52 Stat. 821 (June 21, 1938), *as codified*, 15 U.S.C. § 717, *et seq.* (1970).

[5] See also, *Alabama Electric Cooperative, Inc.* v. *S.E.C.*, 353 F.2d 905, 907 (C.A. D.C. 1965), *certiorari denied*, 383 U.S. 970.

crimination by its regulatees. Employment discrimination is neither cited in those statutes nor in their legislative histories as a matter which the Commission may consider in carrying out the objectives of those statutes.

The Federal Power Commission's objectives are oriented toward economic regulation for the consumer and natural resource development. They are neither directed to nor concerned with the broad areas of enforcing human civil rights. Employment discrimination, therefore, is not related to the Commission's statutory objectives.

Since Congress did not make the eradication of employment discrimination an object of the Commission's enabling statutes, the Commission has no powers or duties in this area. The Commission can do no more or no less than what Congress has authorized it to do (*F.P.C.* v. *Natural Gas Pipeline Co.*, 315 U.S. 575). "The broad responsibilities [of the FPC must be executed] within the limitations imposed by pertinent constitutional and statutory commands" *Permian Basin Area Rate Cases*, 390 U.S. 747, 767. This Court has ruled that "public interest" criteria do not empower agency action in areas beyond those related to the jurisdictional context.[6] The existence, therefore, of a public interest criteria for agency action does not mean jurisdiction applies to all the public interest, but only the public interest related to the statutory objectives. Therefore, the contention

[6] *New York Central Securities Co.* v. *U.S.*, 287 U.S. 12, 24; *McClean Trucking Co.* v. *U.S.*, 321 U.S. 67.

(NAACP Pet. 10–11) that, even without a demonstration that some nexus exists between the statutory objectives of civil rights and the Commission's enabling legislation, the "public interest" is to be broadly construed to include significant national concerns is inconsistent with established criteria for statutory interpretation.

A strikingly similar case was recently decided by the Commonwealth Court of Pennsylvania consistent with the Federal Power Commission's position. *NAACP* v. *Pennsylvania Public Utilities Commission,* 5 Pa. Cm. Ct. 312, 290 A. 2d 704, 95 PUR 3d. 451 (Pa. 1972). The NAACP had sought denial of a utility rate increase filed with the Pennsylvania Utilities Commission (PUC) on the grounds of discrimination in employment by the utility. The PUC denied NAACP's petition to intervene in the case. On appeal, the Pennsylvania court affirmed the PUC's decision holding that the PUC has no power to regulate a public utility's employment practices, at least in a rate case, because that power was conferred upon another agency of the state. The court noted the order which NAACP sought was not provided for in the enabling statute and, "that the PUC was not intended to be a super board of directors for the public utility industry forcing upon the regulated companies general concepts of the public interest" 290 A. 2d at 708. The court distinguished the authority of the Public Service Commission of the District of Columbia which by law expressly has authority to compel compliance with *all* laws of the United States.

Southern Steamship Co. v. *N.L.R.B.*, 316 U.S. 31, 47, is cited by NAACP in support of its position that other agencies must promote national policies not set forth in their statutes. In fact, it supports the contrary view. There this Court held the NLRB had acted beyond its powers and abused its discretion where the Board's orders failed to effectuate the policies of the National Labor Relations Act when a violation of the Criminal Code was found by this Court. Significantly, the relief the NLRB had ordered was held to be inconsistent with the policies of the National Labor Relations Act, rather than other national policies expressed in the Criminal Code.

On the other hand, where other public policies "can be related to the objectives of the statute administered by the agency" (*City of Chicago* v. *F.P.C.*, 385 F.2d 629, 635 (C.A.D.C. 1967), *certiorari denied, sub nom, P.U.C. of Wisconsin* v. *F.P.C.*, 390 U.S. 945), they may be considered by an agency in administering its statute. The antitrust laws are an example of legislative areas whose objectives can be related to the objectives of the statutes administered by this Commission. However, where no such nexus exists, the extraneous statutes are not part of any agency's legitimate concerns. The objectives of the statutes in the field of employment discrimination,[7] do not have the logical relation to the objectives of the statutes

[7] Primarily, the Civil Rights Act of 1964, 42 U.S.C. 2000e.

which the Federal Power Commission administers. As pointed out by the Commission's opinion, citing this Court, *Griggs, et al.* v. *Duke Power Company,* 401 U.S. 424, 429–31 (1971), "[t]he objective of Congress in the enactment of Title VII [of the Civil Rights Act of 1964] * * * was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees * * * what is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate insidiously to discriminate on the basis of racial or other impermissible classification" (Pet. App. 51a). Furtherance of the objectives of the Civil Rights Act by the Federal Power Commission would, therefore, be in furtherance of objectives beyond its statutory mandate.

The mere possibility that at times a Federal Power Commission decision pursuant to its statutory objectives is also coincidentally consistent with the objectives of civil rights laws (such as prohibiting the passing through to customers of costs for judicially imposed fines for violations of civil rights laws) does not justify agency intrusion into the jurisdictional areas mandated by Congress to be administered by others. Commission rejection of such a cost is not because it is related to employment discrimination but because it is cost resulting from an act adjudged illegal by appropriate authority.

The fact that equal employment by its regulatees

is not a statutorily mandated regulatory objective for the Commission, does not leave these valuable rights without a champion. Congress has decreed an end to employment discrimination and has placed the primary responsibility for fulfilling that mandate in Equal Employment Opportunity Commission. The court of appeals found strong evidence of Congress' specific desire not to diffuse authority over employment discrimination among federal agencies other than EEOC.[8] Whether Congress located the enforcement of equal employment opportunities in the EEOC is for all practical purposes answerable in terms of remedies for alleged violations of equal employment law requirements. Insofar as the Commission regulatees are concerned, Congress left the remedies with the EEOC and other appropriate agencies, because in legislating an end to employment discrimination, Congress did not give to this Commission any more authority than that which it previously possessed.

NAACP cites two cases to support its argument that Title VII of the Civil Rights Act of 1964, does not preclude other agencies from exercising jurisdiction concurrently with the EEOC and that other federal remedies are available for employment dis-

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[8] Pet. App. 21a, citing Section 604 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (1970), particularly § 2000d–3 (1970) which states:

"Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment."

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crimination. The Commission does not contend no remedies other than Title VII are available for employment discrimination, and the Commission's opinion recited several such remedies (Pet. App. 50a, 54a–57a). Rather, the Commission contends that concurrent jurisdiction urged by NAACP has not been given to the Federal Power Commission. In the first case cited by NAACP, *United Packinghouse, Food & Allied Workers International Union* v. *N.L.R.B.*, 416 F. 2d 1126 (C.A.D.C. 1969), *certiorari denied*, 396 U.S. 903, the issue as discussed is not pertinent, because it assumed not only a violation of Title VII, but also a violation of the National Labor Relations Act (416 F. 2d at 1133, note 11). The second case, *Johnson* v. *Railway Express Agency*, 421 U.S. 454, equally, is not pertinent. The relevant holding of that case is no more than that an individual, by Title VII, "is not deprived of other remedies he possesses" or of his rights under, "other applicable state and federal statutes." It does not stand for the proposition NAACP espouses: that rights and remedies against employment discrimination exist in any agency having plenary regulatory authority over an industry.

The fact that the Federal Communications Commission has promulgated rules in the area of equal employment practices [9] is not dispositive and is wholly

[9] The relevant FCC regulations are contained in 47 C.F.R. 21.307; 47 C.F.R. 76.311.

distinguishable from the case at hand. The obligations of the FCC place that agency in a position of control over the broadcasting industry.[10] The Communications Act of 1934, 47 U.S.C. 151, *et seq.*, as amended, gave the FCC the responsibility of guarding against racially discriminatory programming.[11] As the court of appeals correctly noted (Pet. App. 22a), the FCC found that the goal of nondiscrimination in programming would be jeopardized if minorities were systematically excluded from a broadcaster's employ. Such a nexus between the agency's mandate and the regulatee's employment practices is lacking with respect to Federal Power Commission action. In any event, this Court has found the FCC's "public interest" responsibilities do not reach to all areas of national concern.[12]

Other regulatory agencies have considered or have pending before them proceedings concerning the issuance of rules on employment discrimination. One, the Federal Home Loan Bank Board has adopted some rules in the area. The court of appeals discussed these matters in detail (Pet App. 23a–24a) and concluded that these actions of other agencies are either distinguishable or not dispositive here. In 1971, the SEC issued rules relating to civil rights matters which bore

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[10] *Red Lion Broadcast Co.* v. *F.C.C.*, 395 U.S. 367.

[11] *Office of Communications of the United Church of Christ* v. *F.C.C.*, 359 F.2d 994 (C.A.D.C. 1966).

[12] *National Broadcasting Co.* v. *U.S.*, 319 U.S. 190, 216, 219; *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285.

a nexus to its regulatory responsibilities.[13] Later the SEC declined to promulgate rules on employment discrimination because no connection was shown with its regulatory responsibilities.[14] More recently it again decided not to prescribe forms requiring specific employment information.[15]

The Civil Aeronautics Board and the Interstate Commerce Commission have issued Notices of Proposed Rulemaking on this subject,[16] but have not taken any further action and apparently await the outcome of these proceedings.

2. The consequences of the court of appeals' decision also indicate its result is impractical and inappropriate. It imposes a burden upon the Federal Power Commission which would severely impair the ability of the Commission to discharge its statutory responsibilities under the Federal Power Act, 16 U.S.C. 791a, *et seq.* and the Natural Gas Act, 15 U.S.C. 717 *et seq.* The thrust of the decision is to permit the introduction into the Commission's economic regulatory proceedings large masses of materials and evidence which may be unrelated to the questions whether a natural gas applicant is ready willing and able to perform a service and that the proposed utility service is required by the public con-

[13] SEC Securities Act Release No. 5170 & Exchange Act Release No. 9252 (1971).

[14] 39 Fed. Reg. 2809, 2810 (1974). *See also* 37 Fed. Reg. 28, 767 (1967).

[15] Securities Act of 1933 Release No. 5627, Securities Exchange Act of 1934 Release, No. 11733, October 14, 1975.

[16] See 37 Fed. Reg. 15518 (1972), and 36 Fed. Reg. 10741 (1971), respectively.

venience and necessity; or whether proposed hydroelectric project works are necessary or convenient for the development and improvement of navigation or for the development, transmission, or utilization of power related to bodies of water subject to Commission jurisdiction.

The Commission recognizes its responsibility to consider whether costs may appropriately be passed on to consumers and in doing so to consider whether the costs are used and useful in the utility operations of the regulatee for the benefit of the customer and whether they are just and reasonable. Unjust and unreasonable costs are disallowed by the uniform accounting requirements of the Commission.[17] For purposes of disallowing such costs the Commission may investigate background facts. It does so systematically under its accounting procedures. These investigations, however, do not determine what the Commission may adjudicate in terms of legal obligations. In allowing or disallowing costs, the Commission commonly must determine whether they result from prudent management decisions. Typically such an evaluation presents no question of whether the company's action is in conformity with other laws, which the Commission has no authority to administer.

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[17] 18 C.F.R. Parts 101, 104, 201, and 204, Uniform Systems of Accounts for Public Utilities, Licensees and Natural Gas Companies, General Instructions, 2E, which reads: "All amounts inincluded in the accounts prescribed herein for [electric and gas plant] and operating expenses shall be just and reasonable and any payments or accruals by the utility in excess of just and reasonable charges shall be included in account 426.5, Other Deductions."

In regulating economic activity the Commission may on occasion be faced with an intersection of its primary statutory responsibility and other laws governing economic activity. While the Commission does not adjudicate violations of such other laws, it may disallow costs incurred in violation of such laws in the discharge of its own regulatory responsibilities.

Quite a different situation is presented in considering costs caused by alleged violations of the civil rights laws. These are statutes with no obvious nexus to the cost factors which the Commission commonly considers. Accordingly, in evaluating the permissability of costs caused by allegedly discriminatory activity, the Commission could not focus solely on the issue of economic prudency. Rather a two-step analysis would be necessary. The Commission would have to determine as a preliminary matter whether there was a violation of civil rights laws. Then, and only then, could it determine whether costs were incurred which should be disallowed. For example, if a boycott assertedly caused by an employer's discriminatory practices leads to ascertainable costs, the question of how to treat the costs could not be determined by reference to the economic prudency of management's action. Rather, the first question would have to be whether the management action leading to the boycott violated the civil rights laws. Only then could the Commission determine whether to allow the costs.

But Congress has not given the Commission authority independently to adjudicate alleged violations of the civil rights laws. Administratively, the Congress has not engaged the Commission in a duplication of functions by empowering it to undertake its own review and hear evidence on the question of whether amounts are being expended for activities which may be contrary to laws which Congress has not given the Commission authority to administer. Of course, if certain activities are finally adjudicated in the appropriate judicial or administrative forum to be contrary to law, the Commission's Uniform System of Accounts require such amounts to be deducted from income.[18]

In addition, were each regulatory agency, each with unique procedures best suited for resolving particular issues coming before it, required to react to demonstrated employment and discrimination, the likely result would be a myriad of conflicting findings and decisions concerning each individual allegation of employment discrimination.

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[18] 18 CFR Parts 101, 104, 201, and 204, Account 426.3 relates to amounts which are income deductions and reads in full: "Penalties. This account shall include payments by the company for penalties or fines for violations of any regulatory statutes by the company or its officials."

This Commission's hearing procedures are geared to the requirements of rate making and licensing. The introduction on a broad scale into such cases of evidence of individual discrimination, testimony upon motive, employment statistics, individual qualifications, and other areas totally outside the Commission's and staff's expertise, would disrupt the course of those already complex procedures and impair the Commission's ability to meet its duties under the Federal Power Act and the Natural Gas Act. Severance of the employment discrimination issues for separate decision would merely serve to delay the outcome of the proceedings and consequently delay final approval of rate increases or authorization for the construction of needed energy facilities.

This nation is currently facing significant natural gas and fuel shortages. It has long been recognized there is a pressing need for exploration and development of natural gas reserves.[19] If this Court were to allow the insertion into Commission certificate or rate proceedings of issues relating to the appropriate employment practices of producers with large numbers of employees, such as Exxon Corporation, Texaco, Inc., or Mobil Oil Corporation, or the thousands of small producers seeking authority to sell natural gas pursuant to Section 4 or 7 of the Natural Gas Act, it could only interminably delay the outcome of their cases and such delay could only be potentially devastating to both producer and Commission efforts

[19] See, *e.g.*, *Placid Oil Co.* v. *F.P.C.*, 483 F. 2d 880 (C.A. 5 1973).

to reduce the burdens which the natural gas shortage has imposed upon this nation.

The Commission's jurisdiction under the Natural Gas Act extends to approximately 6,200 natural gas producers, of which 82 are large producers each selling by definition more than 10 billion cubic feet per year.[20] These producers filed with the Commission a total of 8,062 rate increases in 108 dockets in fiscal year 1975.[21] Additionally, natural gas producers filed 1,366 certificate and abandonment applications during fiscal year 1975.[22]

Moreover, under the Natural Gas Act, the Commission's regulation of national gas producer rates are no longer accomplished on an individual cost of service basis. Rather, nationwide rate ceilings for wellhead sales have been established and the Commission is not concerned with an individual company's cost of doing business. See *Mobil Oil Corp.* v. *F.P.C.*, 417 U.S. 282. If the Commission is required to investigate the employment practices of individual producers the potential burden of reviewing them for the several thousand producers individually would be insurmountable. Moreover, individual review would be wholly incompatible with the framework of the nation-wide or area-wide means of regulating producer rates which have been judicially approved and which are a necessary methodology in the Commission's efforts to al-

[20] Total does not include 54 producers affiliated with natural gas pipelines and large producing companies.

[21] FPC 1975 Annual Report to Congress, Appendix B, Table 31.

[22] *Id.*, Appendix B, Table 32.

leviate the nation's critical natural gas supply shortage. See *Permian Basin Area Rate Cases*, 390 U.S. 747, 755–58.

In addition, the Commission has certificate and rate jurisdiction over 123 interstate natural gas pipelines. In fiscal year 1975 they filed 317 rate increase applications [23] and 515 certification applications.[24] A total of 195 pipeline rate cases and 204 pipeline certificate cases were in litigation during fiscal year 1975.[25] The additional burdens of considering evidence of employment discrimination in the litigated cases alone are apparent.

The Commission's rate jurisdiction extends to about 200 public utilities selling electric energy at wholesale in interstate commerce under the Federal Power Act. In fiscal year 1975, 3,382 electric rate filings were received and a total of 249 electric rate cases were involved in formal litigation during that period.[26] Commission jurisdiction also applies to approximately 210 hydro-electric licensees and more than 600 projects under license. About 117 applications concerning their projects were received during fiscal year 1975,[27] and 50 cases were involved in contested proceedings during the period.[28]

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[23] *Id.*, Appendix B, Table 35.

[24] FPC Budget Estimates, Submission of Office of Management and Budget, Fiscal Year 1977, p. 3–54.

[25] *Id.*, at pp. 3–61 and 3–59.

[26] *Id.*, at pp. 3–40, 3–42.

[27] *Id.* at pp. 3–8 to 3–12.

[28] *Id.* at pp. 3–17.

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The Commission's Congressional mandate has neither allowed nor equipped the Commission to deal effectively with national policies other that the development and conversion of natural resources. Most assuredly, it has not equipped the Commission to deal effectively with employment discrimination.

B. THE FIFTH AMENDMENT DOES NOT REQUIRE THAT A FEDERAL AGENCY ACT AFFIRMATIVELY TO PROHIBIT ANY EMPLOYMENT DISCRIMINATION BY COMPANIES REGULATED BY THE AGENCY

The NAACP states that, "[t]he precise constitutional question in this case is whether the Federal Power Commission, as a government agency, has violated its responsibilities under the Fifth Amendment by not requiring the industry over which it exercises far reaching regulatory control to follow nondiscriminatory employment practices" (NAACP Pet. 17). The argument is that, quite apart from questions of "state action", the Constitution requires every governmental body having the power to regulate, to regulate against employment discrimination. It is, as the court of appeals noted, the "truly anomalous" proposition "that the Constitution compels the legislature affirmatively to legislate in a certain way" (Pet. App. 30a). An argument so completely novel requires a careful analysis of its underlying premises.

NAACP's argument starts from the undoubted premise that racial discrimination in employment, if undertaken by the Federal government, denies to persons discriminated against due process of law under

the Fifth Amendment. It is also common ground that the government may become so deeply embroiled in discrimination by a private entity that that discrimination becomes, for constitutional purposes, the action of government. But NAACP's argument goes much further. NAACP argues that a government agency with plenary jurisdiction to regulate in the public interest for the protection of consumers which fails to act affirmatively in eliminating discriminatory hiring practices in regulated companies, by that failure to act, violates the Fifth and Fourteenth Amendments. This argument is sweeping, is truly a monumental departure from the present law, and must be rejected.

Ninety-two years ago, in the *Civil Rights Cases*, 109 U.S. 3, 17–18, this Court declared that:

> "* * * it is proper to state that civil rights, such as are guaranteed by the constitution against State aggression, cannot be impaired by the wrongful actions of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual unsupported by such authority is simply a private wrong or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; and if not sanctioned in some way by the state, or not done under State Authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress * * *. Hence, in all those

> cases where the Constitution seeks to protect the rights of the citizens against discrimination and unjust laws of the State by prohibiting such laws, it is not individual offenses, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress with power to provide a remedy * * * [The remedy] must assume that in the cases provided for, the evil or wrong actually committed rests upon some state law or state authority for its excuse and perpetration."

The Court thus drew the essential distinction between public acts and private acts inherent in the Fourteenth and Fifth Amendments.

Relying upon this distinction, this Court has stated that, "[i]t is clear as it always has been since the *Civil Rights Cases* * * *, that private conduct abridging individuals rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it." *Burton* v. *Wilmington Parking Authority, et al.* 365 U.S. 715, 722.

In *Cooper* v. *Aaron,* 358 U.S. 1, 19, this Court required a finding of state assistance through some "arrangement, management, funds or property * * *." That test has been reiterated by this Court as recently as last Term. In *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345, this Court has held that actions of a state-regulated privately owned public utility did not become "state actions" because of the regulated status of the utility.

This same essential distinction was stated in *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 173, in which the Court noted:

> The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in the *Civil Rights Cases, supra,* and adhered to in subsequent decisions.

We will show hereafter (*infra.* 38–39) that the actions of the Commission's regulatees do not constitute state action. Recognizing this, NAACP declares that, "[t]he issue is not whether the government involvement in the activities of private companies is sufficient to constitute state action * * *" (NAACP Pet. 17). NAACP goes further and argues that "[t]he precise Constitutional question is whether the Federal Power Commission, as a governmental agency, has violated its responsibilities under the Fifth Amendment by not requiring the industry over which it exercises far reaching regulatory control to follow nondiscriminatory employment practices" (*ibid.*).

The cases cited by NAACP do not support its novel theory. *Green* v. *Kennedy,* 309 F. Supp. 1127

(D.D.C. 1970), *affirmed sub nom., Coit* v. *Green,* 404 U.S. 997, cited by the NAACP (NAACP Pet. 18), does not speak to the issue here presented. In *Green,* the Secretary of the Treasury was enjoined from granting tax exempt status to private, segregated schools in Mississippi. This action was based upon a finding by the district court, "* * * that segregated private schools [have] been established in Mississippi for the purpose of avoiding the result of a unitary, non-racial public school system required by the Federal court decisions outlawing segregation in public schools and in an attempt to maintain a broad pattern of racial segregation in the school system" (309 F. Supp. at 1134).

Further, the Court found: "* * * on the evidence presented on the motion, that the tax benefits under the Internal Revenue Code mean a substantial and significant support by the Government to the segregated private school pattern" (*ibid.*). The Court concluded: "[t]here is substantial support for the conclusions that the validity of tax exemption and deductibility of contributions are to be determined on the basis of (1) their practical tendency to increase the incidence of private discrimination, and (2) whether the discrimination so augmented frustrates the exercise of fundamental liberties" (*id.* at 1136). In other words, the Court found a Fifth Amendment duty arising from the measurable relationship between government aid and the frustration of fundamental liberties.

Throughout the Court's opinion in *Green,* it is emphasized that the tax benefits operate as government support for the segregation. The Court states, "[t]he Federal Government is not constitutionally free to frustrate the only constitutionally permissible state policy, of a unitary school system, by providing government support for endeavors to continue under private auspices the kind of racially segregated dual school system that the state formerly supported [through state tuition grants]" (*id.* at 1137).

Green v. *Kennedy* basically is a "state action" case. The Government activity complained of operates to support the denial of equal protection. NAACP's reliance on *Green* v. *Kennedy* to support its argument that state action is not a necessary ingredient of constitutional duties is therefore misplaced.

The NAACP argument ignores the traditional test for determining whether private acts are to be deemed state actions. Such a departure from the present state law is unwarranted and unwise.

If accepted, the doctrine advanced by NAACP would have consequences far beyond the field of employment discrimination. If agencies are charged with a constitutional duty to assure that there is no denial of due process of law in any area of each of its regulatee's activities, the entire panoply of rules for the enforcement of due process and equal protection will be placed upon the shoulders of each agency for separate enforcement. Indeed, Congress would be constitutionally prohibited from centralizing the enforcement

of rights in a single authority, as it has attempted to do with the EEOC. Moreover, private, albeit regulated, entities would be required to insure not only equal employment opportunity but procedural and substantive due process in all areas of their operations. Before agencies would be free to act in their particular statutory sphere of expertise, agencies would have to consider all such claims raised against their regulatees and to weigh the merits of those claims even and most often in areas totally unrelated to their expertise.

If the NAACP's argument were to be accepted by the Court, there need be no causal interrelation between an agency's substantial regulatory involvement and its constitutional duties. Any amount of regulatory authority over a company would require the regulatee to operate in accord with the Fifth Amendment. Using the analogy of Mr. Justice Douglas' dissenting opinion in *Moose Lodge* v. *Irvis, supra,* NAACP's argument requires that "the grant to a householder of a permit to operate an incinerator puts the householder in the public domain," [29] and mandates that his actions comply with the duties imposed on the federal and state governments by the Fifth and Fourteenth Amendments.

The argument NAACP would have this Court adopt is completely without precedent, flies in the face of the recognized distinction between public and private acts noted in the *Civil Rights Cases, supra,* is com-

[29] 407 U.S. at 180.

pletely inconsistent with the "state action" doctrine, and admits of no limitations upon its scope.

There remains only the question whether the Federal Power Commission is involved with the activities of its regulatees to a degree sufficient to constitute "state action". We note that NAACP does not ask this Court to determine whether the action of the Commission's regulatees is "state action" (NAACP Pet. 17). Nevertheless, since state action is the only peg upon which a constitutional duty could hang, it is appropriate to dispose of that issue here.

The state action issue, as it applies to the Commission's regulatees, was decided by this Court only last term in *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345. The statutory powers of the Federal Power Commission, described in the opinion below, (Pet. App. 10a–15a), are quite similar to those exercised by the Pennsylvania Public Utility Commission over Metropolitan Edison Company as set forth in *Jackson.* In *Jackson,* the Court stated (419 U.S. at 350–351): "It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be 'state' acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of

the State itself."[30] In this case, as in *Jackson*, the fact of regulation cannot turn private discrimination into state action. There is not a "sufficiently close nexus" between that regulation and the alleged discrimination; nor has the government "so far insinuated itself into a position of interdependence"[31] with the regulatee.[32]

Once perceived in its fullness, the NAACP's argument, that the Constitution by its own force requires every Federal agency to require every regulatee to ensure the constitutional rights of its employees, must be rejected. It eviscerates the distinction between state acts and private acts inherent in both the Fifth and Fourteenth Amendments. Furthermore, it is totally without any rational boundaries.

In sum, the Fifth Amendment does not require a federal agency to act affirmatively to prohibit denial of due process of law by regulated companies.

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[30] 419 U.S. at 350–51.

[31] *Burton* v. *Wilmington Parking Authority, et al.*, 365 U.S. 715, 725 (1960).

[32] NAACP also cites certain cases involving Hill-Burton Act assistance to private hospitals. These cases are inapposite to this proceeding. *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (C.A. 4 1963) *certiorari denied* 376 U.S. 938 (1964); *Sams* v. *Ohio Valley Hospital Ass'n.*, 413 F. 2d 826 (C.A. 4 1969); and *Ward* v. *St. Anthony Hospital*, 476 F. 2d 671 (C.A. 10 1973), involves hospitals receiving direct federal assistance. These cases do not speak to the "fostering" argument advanced by NAACP.

II

IF LIMITED JURISDICTION TO CONSIDER EMPLOYMENT DISCRIMINATION EXISTS WITH THE FEDERAL POWER COMMISSION, IT IS NOT REQUIRED TO ISSUE RULES TO PREVENT EMPLOYMENT DISCRIMINATION

NAACP argues that once jurisdiction is determined to exist, even the so-called limited jurisdiction, the Federal Power Commission has a duty to act affirmatively to prevent employment discrimination and must, therefore, issue rules (NAACP Pet. 14–16). It argues that the court of appeals erred in finding that the Commission's authority to issue rules is discretionary.

Contrary to NAACP's contention, the Constitution does not require the issuance of administrative rules in all areas of Civil Rights or any other area protected by the Constitution; nor would the existence of general statutory authority under the Natural Gas Act or the Federal Power Act over employment discrimination require the Commission to issue rules requested by NAACP. Those statutes provide discretionary authority in Sections 16 and 309,[33] respectively, to issue appropriate rules and regulations found desirable in carrying out their statutory purposes.

NAACP cite no cases for its novel proposition. On the other hand, strong precedent exists to support the court of appeals' holding. This Court has stated that

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[33] 15 U.S.C. 717o and 16 U.S.C. 825h, respectively.

a rigid requirement that rules be promulgated (*S.E.C.* v. *Chenery Corp.*, 332 U.S. 194, 202–203):

> would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. See Report of the Attorney General's Committee on Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess., p. 29. Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.
>
> In other words, problems may arise in a case which the administrative agency could not reasonably foresee problems which must be solved despite the absence of a relevant general rule. Or the agency may not have sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on

> a case-to-case basis if the administrative process is to be effective. There is, thus, a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency. See *Columbia Broadcasting System* v. *United States,* 316 U.S. 407, 421.
>
> Hence we refuse to say that the Commission, which had not previously been confronted with the problem of management trading during reorganization, was forbidden from utilizing this particular proceeding for announcing and applying a new standard of conduct. Cf. *Federal Trade Commission* v. *Keppel & Bro.,* 291 U.S. 304.

Repeating its basic argument, NAACP suggests a nexus exists between the cost of practicing employment discrimination and the Commission's duty to see no illegitimate costs are passed on to consumers. As we have pointed out *supra,* the basic argument is answered by the Commission's lack of legislative authority to regulate utility employment practices. The Commission's duty to assure the efficient performance of an industry does not translate into the authority to assure there is no employment discrimination. NAACP's argument assumes that practicing employment discrimination by a regulatee will necessarily result in an inadequacy of service or higher prices. This has not been demonstrated. That a nexus may coincidentally exist in certain cases would neither dictate nor justify a rule of general applicability.

CONCLUSION

For the reasons stated, insofar as it set aside Opinion Nos. 623 and 623–A of the Federal Power Commission, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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I authorize the filing of this brief.

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